EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

CIN-Q AUTOMOBILES, INC. and MEDICAL & CHIROPRACTIC CLINIC, INC., Florida corporations, individually and as the representative of a class of similarly-situated persons,	
Plaintiff,	Civil Action No.: 8:13-CV-01592-17 EAK-AEP
v.	
BUCCANEERS LIMITED PARTNERSHIP and JOHN DOES 1-10,	**Dispositive Motion Pursuant to LR 3.01(h)**
Defendants.	

PLAINTIFFS' MOTION AND MEMORANDUM OF LAW
IN SUPPORT OF SUMMARY JUDGMENT

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STATUTES and RULES

The Court should hold Defendant Buccaneers Limited Partnership ("BLP") directly liable under the Telephone Consumer Protection Act of 1991 ("TCPA"). The Court already held BLP is the "sender," since its "goods or services" are advertised in the faxes sent to Plaintiffs (Doc. 41 at 4), and the FCC has ruled a sender is "ultimately liable," 10 FCC Rcd 12391 ¶ 34, even if it relies on a fax broadcaster's misrepresentations "about the legality" of the faxing, 21 FCC Rcd 3787 ¶ 40. The remaining elements of a TCPA claim are undisputed, so summary judgment is appropriate. The Court should also find BLP sent faxes "willfully or knowingly," warranting treble damages.

Even in the absence of "sender" liability, BLP is liable under the common law of agency and torts for the actions of its fax broadcaster, FaxQom. BLP kept faxing after it had actual notice of its TCPA violations, ratifying the acts of its agent, and it had complete control over the fax campaign, designing the faxes, choosing the area codes, specifying dates and times for broadcasts, monitoring the broadcasts, tracking ticket sales generated, and sending more faxes based on the results. BLP was negligent in hiring and supervising FaxQom. But FaxQom sent the faxes as directed, and BLP reaped the benefits. Now BLP is liable for the consequences.

Statement of Undisputed Facts[1]

A. BLP decides to advertise by fax, designs the fax advertisement, and hires FaxQom to send the faxes.

BLP owns the Tampa Bay Buccaneers and sells tickets to its games. (Kaiser Dep. at 68). Matt Kaiser, BLP's Director of New Business Development, testified as BLP's Rule 30(b)(6) representative. (*Id.* at 13). In early 2009, Kaiser pitched an idea to his superiors to "generate some

[1] The following are attached in Plaintiffs' Appendix of Exhibits: Ex. A, Deposition of Matthew Kaiser ("Kaiser Dep."); Ex. B, BLP Resp. First Req. Admissions; Ex. C, Group Exhibit of Business Records Produced by BLP; Ex. D, Second Am. Compl.; Ex. E, Deposition of Craig Cinque ("Cinque Dep."); Ex. F, Affidavit of Phyllis J. Towzey ("Towzey Aff."); Ex. G, Deposition of Manuel Alvare ("Alvare Dep."); Ex. H, Cin-Q State Court Complaint Against BLP; Ex. I, BLP Mot. Dismiss State Court Complaint; Ex. J, Declaration of Robert Biggerstaff ("Biggerstaff Decl."); Ex. K, Deposition of Michele Zakrzewski ("M. Zakrzewski Dep"); Ex. L, *In re GroupMe, Inc./Skype Communications*, Docket No. 02-278, FCC-14-33, 2014 WL 1266074 (Mar. 27, 2014).

ticket sales" by sending advertisements to fax numbers in and around Tampa Bay. (*Id.* at 68). Kaiser had access to the team's "existing contacts," but wanted to drum up "new business" by targeting new customers. (*Id.*) Kaiser was then authorized by BLP to hire a fax broadcaster to execute the advertising campaign. (BLP Resp. First Req. Admissions, No. 117).

Kaiser knew prior to hiring FaxQom there was a federal statute called the TCPA that imposed "liability associated with the unsolicited sending of faxes." (Kaiser Dep. at 72, 121). BLP had a copy of a 2006 FCC order explaining that where "a fax broadcaster . . . makes representations about the legality of faxing," leading to unsolicited faxes being sent, "the sender is liable," while the fax broadcaster may also be "jointly and severally liable" in some circumstances. (BLP000890).

Kaiser conducted internet research on fax broadcasters and settled on a company called FaxQom. (Kaiser Dep. at 66). Kaiser does not remember whether FaxQom provided references, whether he checked the Better Business Bureau for complaints about FaxQom, or whether he asked if FaxQom "maintained liability insurance." (*Id.* at 117–18). Kaiser did not research whether FaxQom was "a legal incorporated business," and he was not "concern[ed]" with where FaxQom was physically located. (*Id.*) Kaiser did not ask how many employees FaxQom had. (*Id.* at 93).

Kaiser thought consumers could "opt-in" under the TCPA if they "[a]greed to receive faxes" from the fax broadcaster. (*Id.* at 72, 84). So he wanted to send to people who "had agreed to receive from FaxQom." (*Id.* at 97). On June 24, 2009, Kaiser told FaxQom that "[a]fter reading some literature" about the TCPA, he was "concerned" and asked, "[c]an you please tell me if 100% of the numbers you gather have opted in, to receive your faxes?" (BLP000011). Kaiser asked if FaxQom would "indemnify us from any complaints or potential financial recourse as it relates to the fines imposed for spam mail?" (*Id.*) FaxQom stated it had millions of fax numbers, that "100% of our data is 'opt-in,'" and that it was "no problem" to indemnify BLP. (BLP000013). Kaiser "trusted"

FaxQom. (Kaiser Dep. at 96). Kaiser does not remember if FaxQom explained how it supposedly obtained permission from millions of people (*id.* at 91), other than "legal techniques" (*id.* at 144).

On June 26, 2009, Kaiser sent FaxQom a draft advertisement created by BLP, listing "group ticket" prices. (BLP000022). FaxQom responded, "[c]opy looks great . . . [w]hat day would you like to launch?" (BLP000025). FaxQom recommended BLP add the following language, which BLP "squeeze[d]" in at the bottom using 9-point font: "To immediately and permanently remove your fax number from our opt-in compiled database, please call 877-272-7614. Removaltech@FaxQom.com." (BLP000029). The language does not provide a fax number for opt-out requests or state that a sender's failure to comply within 30 days is unlawful. (*Id.*)

On July 9, 2009, BLP and FaxQom executed a "Fax Indemnity Agreement." (BLP000068). The first page states FaxQom "agrees to indemnify defend, and hold harmless" BLP from legal issues that "arise from fax broadcasting through FaxQom." (BLP000068). Kaiser drafted an addendum to give BLP greater "comfort." (Kaiser Dep. at 108). It states (1) FaxQom will "stop the campaign and refund all monies" at BLP's request, (2) FaxQom "indemnifies the Tampa Bay Buccaneers from any and all complaints or litigation that may arise as a result of this campaign," (3) FaxQom will report "successfully delivered faxes" and charge BLP only for successful faxes, (4) FaxQom will "send all faxes at the times and dates" specified by BLP, (5) "all faxes have been collected according to the best industry practices," and (6) "FaxQom will agree to and abide by all laws associated with facimile [sic] marketing." (BLP000069). BLP's in-house General Counsel, Manuel Alvare, reviewed and approved the agreement. (BLP00136).

The agreement does not specify how FaxQom would mechanically transmit the fax advertisements over phone lines or prohibit FaxQom from using third parties to do so. (BLP000068–69). Kaiser proceeded to place orders for thousands of fax advertisements. (Kaiser Dep. at 107–08). Kaiser did not feel it was "necessary" to do anything else to verify the legality of

the fax campaign. (*Id.* at 131). Kaiser never asked FaxQom for a list of the fax numbers or contact information for any of the intended targets to verify they had "opted in." (*Id.* at 132).

B. BLP tells FaxQom to send fax advertisements to area codes 352, 941, 813, and 727 on July 14–16, 2009, including to Medical & Chiropractic on July 15, 2009.

On July 9, 2009, BLP directed FaxQom to send advertisements for Buccaneers tickets to fax numbers in selected area codes on the following schedule: area code 727 – July 14, 2009; area code 813 – July 15, 2009; area codes 352 and 941 – July 16, 2009. (BLP000067). BLP specified that fax broadcasts begin at 9:15 a.m. (*Id.*) BLP insisted on controlling the specific time of day faxes were sent because BLP had "a sales department that needs to be available when people receive these" and "[i]f they go out late, our sales people will leave for the day." (BLP000093). BLP paid FaxQom $15,336.80 for these first three broadcasts. (BLP000038).

On July 13, 2009, BLP sent FaxQom the final version of its first fax advertisement. (BLP000040–42). The fax was two pages, with a cover page stating, "attached is the information on group seating." (*Id.*) The fax contains the "remove" language BLP added at the bottom. (*Id.*) Kaiser instructed FaxQom the fax was "for tomorrow only," and he would "send you the ones for Wednesday and Thursday after this one goes out." (*Id.*). BLP told FaxQom it had no authority to modify the content of the faxes, except at BLP's direction. (Kaiser Dep. at 273). Kaiser told FaxQom to add his fax number to the list so he could monitor the broadcast in real time. (*Id.* at 48).

On July 14, 2009, at 11:18 a.m., Kaiser had not yet received the advertisement on his fax machine, so he sent FaxQom an email asking whether it put his fax number "on the list" as he instructed. (BLP000043). FaxQom stated it did, and Kaiser sent FaxQom "the Wednesday and Thursday faxes (marked as 7/15 and 7/16)." (BLP000044).

On July 15, 2009, Plaintiff Medical & Chiropractic received a Buccaneers advertisement on its fax machine in area code 813, according to schedule. (M. Zakrzewski Dep. at 9–10, 121; Second Am. Compl., Ex. A). The fax is identical to the "7/15" fax Kaiser sent to FaxQom. (Second Am.

Compl, Ex. A; BLP000045–46). Medical & Chiropractic had no business relationship with BLP and never gave BLP permission to send it fax advertisements. (M. Zakrzewski Dep. at 207, 222).

C. BLP immediately begins receiving complaints about unsolicited faxes.

On July 15, 2009, BLP received a phone call from 813 area code resident Mike Paschke, complaining that he "received numerous faxes," that he had filed "law suits" against marketing companies before, that he was "going to contact [the] State Attorney office," and that he "would like a call back with the name of the marketing company [BLP] used." (BLP000053). Ben Milsom, BLP's Director of Sales, asked Kaiser, "[a]ny response to this?" (*Id.*)

Kaiser forwarded Milsom's email to Ed Glazer, the chairman and owner of BLP (Kaiser Dep. at 22), asking, "[w]ould you like me to call this guy back and give him the information?" (BLP000052). Glazer told Kaiser, "email me our signed indemnification" and do not "worry about" calling Paschke. (BLP000052). Kaiser told Milsom for future complaints about unsolicited faxes, "just tell them that the opt out info is located" on page two. (*Id.*) Kaiser told Glazer Paschke' s fax number would not be "on our next go around," and that "[a]ll is well." (BLP000058).

D. BLP tracks the results of the first round of fax broadcasts, concludes it was effective in generating ticket sales, and sends more faxes.

On July 20, 2009, eleven days into the campaign, Milsom reported to his colleagues: "So far we have generated $12,643 in Group Sales revenue from the Group Fax Blasts." (BLP00676).

Kaiser responded, "Great! The cost was $15,336 (since we did 2-page faxes). One more sale and we're about there." (*Id.*)

E. BLP receives additional complaints about the fax campaign.

On July 22, 2009, Nick Coblio, an 813 area code resident, called BLP to complain about the unsolicited Buccaneers fax and a text advertisement received on his cell phone. (BLP00677). At the time, BLP was saturating the market with hundreds of thousands of text and email advertisements, in addition to the faxes. (BLP00144–47). Milsom spoke to Coblio and reported to Kaiser that he

threatened to "file a complaint with the FCC." (*Id.*) Kaiser responded, "just add both his fax and mobile to the list, so I can send this to the companies if we decide to go for round 2 (which we will likely do)." (*Id.*) Kaiser also referred to a "hospital" that "received all the faxes" and asked Milsom to add the Hospital's number to the "remove" list as well. (*Id.*)

Kaiser brushed off the complaints about the fax and text campaigns, stating, "[i]f these people didn't sign up for every free offer they see, then their names probably wouldn't end up in 2 separately complied [sic] marketing databases of 'opted-in' recipients. I wish there was a nice way to explain that to them." (BLP00677). In BLP's view, it was the consumers' own fault they were receiving the faxes, not BLP's. (*Id.*)

F. BLP directs FaxQom to send fax advertisements to area codes 727, 813, 352, and 941 on August 17–20, 2009, including to Cin-Q on August 19, 2009.

On August 13, 2009, BLP directed FaxQom to send an advertisement for "individual game tickets" to area codes on the following schedule: area code 727 – August 17, 2009; area code 813 – August 18, 2009; area code 352 – August 19, 2009; area code 941 – August 30, 2009. (BLP000087). BLP required broadcasts begin at 9:30 a.m. (*Id.*) Kaiser sent the new advertisement to FaxQom, but did not attach the Fax Indemnity Agreement or addendum. (BLP000090–91). BLP paid FaxQom $7,668.40 for the second round of broadcasts. (BLP000087).

On August 17, 2009, Kaiser asked FaxQom, "Did the fax go out today? I have not received my copy?" (BLP000092). FaxQom responded, "[y]ou'll get your copies . . . things are running slow as we are all 100% capacity today." (BLP000093). Kaiser responded he was "less concerned with my copy than I am keeping the schedule for the faxes to be sent." (BLP000093). He explained, "we have a sales department that needs to be available when people receive these" and stressed that "[w]e must keep schedule tomorrow and through the rest of the week." (*Id.*)

On August 19, 2009, as scheduled, Plaintiff Cin-Q received the "individual game tickets" fax at its area code 352 fax number. (Cinque Dep. at 268; Second Am. Compl., Ex. B). Cin-Q had no

business relationship with BLP and never gave BLP permission to send it fax advertisements. (Cinque Dep. at 150).

G. Attorney Phyllis Towzey notifies BLP it is violating the TCPA.

On August 20, 2009, attorney Phyllis J. Towzey sent a letter to BLP's registered agent complaining of fax advertisements she received at her office on July 14, 2009, and August 17, 2009. (Towzey Aff. ¶¶ 1, 5, 6). Towzey had no business relationship with BLP and did not give BLP permission to send fax advertisements. (*Id.* ¶¶ 7, 8). Towzey warned BLP the TCPA prohibits fax advertisements without "prior express invitation or permission" and imposes $500 damages per violation, which can be increased to $1,500 for "willfully or knowingly" violating the statute, setting forth verbatim portions of the statute. (*Id.* ¶ 11; *id.*, Ex. A). Towzey offered to settle for $1,000. (*Id.*, Ex. A at 1, 2). Towzey warned she planned to sue BLP in this Court. (*Id.*)

Shortly thereafter, Towzey received a phone call from Alvare, BLP's General Counsel, who stated he received the August 20 letter. (Towzey Aff. ¶ 15; Alvare Dep. at 44). Alvare told Towzey the faxes had been sent by FaxQom and that FaxQom was liable for any damages because it "sent" the fax, not BLP. (Towzey Aff. ¶¶ 16, 17; Alvare Dep. at 44–46).

H. Cin-Q serves BLP with a TCPA class-action lawsuit.

On August 28, 2009, Cin-Q filed a class-action lawsuit against BLP under the TCPA in Florida state court. (Ex. H). Cin-Q served the Complaint on BLP's registered agent September 7, 2009. (*Id.*) BLP hired outside counsel to defend the case. Counsel appeared in the case October 5, 2009, and filed a Motion to Dismiss. (Ex. I).

The Complaint alleged BLP sent the "individual game tickets" fax to Cin-Q on August 19, 2009 (attaching a copy), that BLP had not obtained permission, and that BLP was therefore liable for $500 minimum damages. (Ex. F ¶¶ 12, 27). The Complaint alleged BLP sent the same or similar faxes to a class of "fifty or more persons." (*Id.* ¶ 17). It alleged "[t]he TCPA is a strict liability

statute," making BLP liable "even if its actions were only negligent." (*Id.* ¶ 30). And it alleged the class members had not given permission "for Defendant or anyone else to fax advertisements about Defendant's goods or services" to them. (*Id.* ¶ 31).

I. Towzey corrects Alvare's misunderstanding of TCPA "sender" liability.

On September 16, 2009, Towzey wrote a second letter to Alvare, stating it was irrelevant whether a "vendor actually sent the fax," since "the fax was clearly sent on behalf of the Tampa Bay Buccaneers, and expressly solicits the purchase of tickets for Bucs games." (Towzey Aff., Ex. C). Alvare called Towzey again, asking her not to file a lawsuit and assuring her he would make sure she did not receive any more unsolicited faxes from BLP and "see what he could do" to make FaxQom pay her damages. (*Id.* ¶ 22). Towzey has not received any compensation to date. (Towzey Aff. at ¶ 23). As a member of the putative class, Towzey will recover if Plaintiffs are successful.

J. BLP seeks indemnification from FaxQom.

On October 2, 2009, BLP's outside counsel sent a letter to FaxQom at the address it provided Kaiser, demanding FaxQom "provide a legal defense" in this lawsuit and "indemnify BLP to the fullest extent of the law." (BLP00789). The letter was returned as undeliverable. (BLP00794). On April 8, 2014, BLP filed a third-party complaint against FaxQom. (Doc. 120).

K. BLP tells FaxQom to execute a third round of fax broadcasts on May 24–26, 2010, including a fax to Plaintiff Medical & Chiropractic on May 24, 2010.

On May 18, 2010, BLP directed FaxQom to send a third round of faxes to area code 813 – May 24, 2014; area code 727 – May 25, 2014; and area codes 352 and 941 – May 26, 2014. (BLP000107). BLP specified that broadcasts begin at 9:45 a.m. (*Id.*) BLP did not attach the Fax Indemnity Agreement. (*Id.*) Instead, for the first time, Kaiser added handwritten language stating FaxQom will "indemnify and hold harmless Tampa Bay Buccaneers and any of its affiliates, agents, or employees harmless from any claims, complaints, or FCC violations as a result of this campaign and hereby confirms that all numbers have been collected lawfully and with cause." (BLP000109).

BLP sent FaxQom the new fax advertisement it designed and directed FaxQom to add opt-out language "simply about the opt-out." (BLP00307). On May 20, 2010, BLP sent a revised order form and stated payment for the broadcast would be delivered the next day, reminding FaxQom to "show me the proof of the opt out info you add." (BLP00310). Kaiser directed FaxQom to "swap out" the second page of half of the faxes to each area code with a different page BLP had designed, and to "please acknowledge my indemnification note." (BLP00310).

On May 24, 2010, Plaintiff Medical & Chiropractic received the new advertisement at its area code 813 fax number. (Biggerstaff Decl. ¶ 7). As with the fax it received on July 15, 2009, Medical & Chiropractic did not give BLP permission to send the fax. (M. Zakrzewski Dep. at 207, 222). From May 25–28, 2010, BLP made a series of interim modifications from the written broadcast order, varying the area codes (BLP00319) and content of the faxes (BLP00321–22; BLP00325–26). On June 1, 2010, Kaiser reminded FaxQom, "I never received a signed copy of the order form back from you" with the handwritten indemnification language. (BLP00328).

L. The Florida Attorney General serves a cease-and-desist letter on BLP.

On June 3, 2010, the Florida Attorney General sent BLP a letter stating it received complaints BLP had sent unsolicited fax advertisements and that it is "unlawful to transmit an unsolicited facsimile" under Florida law and "47 U.S. C. § 227(b)(1)(C) and the Junk Fax Protection Act of 2005 set forth a similar prohibition under federal law." (BLP00758). The AG concluded that, "[b]ased upon the information received by this office, your company is in violation of either the state or federal laws (or both)," that violations "carry civil penalties of $500.00 per transmission," and that BLP was advised to stop immediately. (*Id.*)

On June 3, 2010, BLP was planning its next round of fax broadcasts, and Kaiser was still asking FaxQom for its "acceptance" of his handwritten language regarding indemnification of BLP "employees" (BLP00330), although thousands of faxes had already been sent since he proposed that

language two weeks earlier (BLP000109). Kaiser insisted he needed FaxQom's signature "before any more go out." (BLP00333). FaxQom did as it was told and stopped sending faxes. (BLP00336). FaxQom sent its signature on June 7, 2010, and BLP authorized FaxQom to resume faxing. (BLP00343). On June 9, 2010, FaxQom reported area code 352 "will complete tomorrow morning," and Kaiser told FaxQom to "finish 727 on Tuesday, Wednesday, and Thursday." (BLP00631).

On June 9, 2010, at 2:32 p.m., BLP's Senior Director of Sales and Advertising, Jason Layton, sent an email to Kaiser and others attaching the Florida AG's cease-and-desist letter, stating, "[w]e should probably stop sending the faxes based on the attached." (BLP00759). Kaiser responded that "for now" BLP would hold off, until he could "get a complete explanation of which statutes have been violated and exactly what that means." (BLP00759).

M. BLP stops faxing and consults an attorney for advice.

On June 9, 2010, BLP directed FaxQom to stop faxing. (BLP00350). On June 16, 2010, BLP told FaxQom that, "at least for now," it was not comfortable "moving forward with more faxes," although it might do so "after some further research" being conducted by its attorney. (BLP00356).

Argument

I. BLP is directly liable as the "sender" of unsolicited fax advertisements under the TCPA and FCC regulations.

The Court has already held BLP is the "sender" because the faxes advertise BLP's "goods or services." (Doc. 41 at 4). BLP claims it cannot be held liable because FaxQom misrepresented that the faxes were legal. As argued blow, the FCC issued a final order on this precise issue in 2006, ruling the sender is ultimately liable for all unsolicited faxes, even if it is misled by a fax broadcaster. The TCPA is "essentially a strict liability statute," imposing liability even for "erroneous" faxes. *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 776 (11th Cir. 2011). The sender's intent is irrelevant, "except when awarding treble damages." *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 2013 WL 3654550, at *3 (W.D. Mich. July 12, 2013).

A. The sender is "ultimately liable" for all unsolicited faxes under the TCPA, even if it is misled by a fax broadcaster.

In 2006, the FCC addressed a common scenario in which "a fax broadcaster . . . provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules," leading to unsolicited faxes being sent. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd 3787, 3808 ¶ 40 (Apr. 6, 2006) ("2006 Junk Fax Order"). The FCC ruled "the sender is liable for violations of the facsimile advertising rules" under this scenario, even if it was misled by the fax broadcaster. *Id.* ¶ 39. As for the fax broadcaster, the FCC ruled it "may be held jointly and severally liable"—along with the "sender"—if it has a "high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent" it. *Id.* ¶ 40. This final order reaffirmed the FCC's longstanding rule that the "entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407–08, ¶¶ 34–35 (July 26, 1995).

To remove any confusion in future cases where a fax broadcaster misleads an advertiser, the FCC issued a regulation defining "sender" as the person or entity (1) "on whose behalf" the fax is sent or (2) "whose goods or services" are advertised. 47 C.F.R. § 64.1200(f)(10). The "whose goods or services" part of the definition cements the FCC's ruling that a sender cannot escape TCPA liability by arguing faxes were not sent "on [its] behalf" on the basis that the fax broadcaster was authorized to send only legal faxes. 21 FCC Rcd 3787, 3808 ¶ 40

Since 2006, the courts have consistently relied on the FCC's rulings and the definition of "sender" to reject arguments that advertisers are not liable if they are misled by fax broadcasters. In *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 2013 WL 3654550, at *3 (W.D. Mich. July 12, 2013), for example, the defendants asked the broadcaster "whether its practices were legal," the

broadcaster "answered in the affirmative," and the defendants "accepted the response as true." The court granted the plaintiff summary judgment, observing the defendants may have been "victims of fraud or negligence (for not consulting a lawyer)," but they were nonetheless "senders" under § 64.1200(f)(10) and ultimately liable for the TCPA violations. *Id.* at *3 & n.2.

Likewise, in *Glen Ellyn Pharmacy v. Promius Pharma, LLC*, 2009 WL 2973046, at *2 (N.D. Ill. Sept. 11, 2009), the defendant had a written contract with the fax broadcaster stating it would "comply with all applicable laws and regulations in performing the Services, including, without limitation, the Federal Junk Fax Protection Act of 2005 (47 U.S.C. 227)." The defendant moved for summary judgment, arguing it could not be held liable given the scope of the scope of the broadcaster's contractual authority. *Id.* at *3. The Court denied the motion, holding that the FCC's rulings making the seller "ultimately liable" were binding. *Id.* at *4.

The definition of "sender" and the FCC's rulings are unambiguous and conclusive. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (unambiguous statutes "must be ordinarily regarded as conclusive"); *Boeing Co. v. United States*, 258 F.3d 958, 967 (9th Cir. 2001) ("tenets of statutory construction apply with equal force to the interpretation of regulations"); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (regulation unambiguously defined "facility" as physical place, and court was bound to "follow the law as written"). Congress vested the judicial power to consider a challenge to final FCC orders "exclusively" in the federal courts of appeal under 28 U.S.C. § 2342, the "Hobbs Act." *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 463 (11th Cir. 2012). Since BLP cannot challenge the FCC rules making a "sender" who is misled by a fax broadcaster ultimately liable in this Court, all that is left is to apply those rules.

B. BLP is the "sender" under both parts of the regulatory definition.

There are two ways a person may be the "sender" of an unsolicited fax: (1) as the person "on whose behalf" the fax is sent or (2) as the person whose "goods or services" are advertised. 47

C.F.R. § 64.1200(f)(10). The FCC interpreted the first part of the definition in the 2006 Junk Fax Order, ruling that "[i]n most instances," the person or entity "on whose behalf" faxes are sent means "the entity whose product or service is advertised or promoted in the message." 21 FCC Rcd at 3808 ¶ 39. The FCC's interpretation of its own regulation is entitled to substantial deference. *Blessitt v. Ret. Plan For Employees of Dixie Engine Co.*, 848 F.2d 1164, 1168 (11th Cir. 1988). Because BLP admits its products or services are advertised in the faxes, BLP meets the first part of the definition.

The Court has already held BLP's "goods or services are advertised or promoted in the unsolicited advertisement" (Doc. 41 at 4), and BLP admits this factor (BLP Resp. First Interrogs. No. 17). Therefore, BLP is the "sender," even if the faxes were not sent "on [its] behalf."

C. The remaining elements of a TCPA claim are undisputed, entitling Plaintiffs to summary judgment.

The elements of a TCPA fax claim are (1) the defendant is a "sender," (2) the faxes are sent using "a telephone facsimile machine, computer, or other device," (3) the faxes are advertisements, and (4) the faxes are either "unsolicited" or lack compliant opt-out language. *See Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013). BLP does not dispute the faxes were sent using "a telephone facsimile machine, computer, or other device" (Doc. 120 ¶ 29), or that the faxes are "advertisements" (Ex. B, No. 17). Plaintiffs testified they did not give permission to BLP to send faxes or have an established business relationship ("EBR") with BLP. (M. Zakrzewski Dep. at 207, 222; Cinque Dep. at 150). BLP had no evidence of EBR or permission when it answered Plaintiff's interrogatories (BLP Resp. First Interrogs. No. 6 (investigation "ongoing")), and it has none now.

Even if BLP had some evidence of EBR or permission, the faxes do not contain compliant opt-out notice, meaning it cannot raise either defense. *See Turza*, 728 F.3d at 683 (fax advertisements without compliant opt-out language "violate the Act whether or not the recipients were among [the defendant's] clients"); *Nack v. Walburg*, 715 F.3d 680, 685–86 (8th Cir. 2013) (same). Since BLP has no defenses, Plaintiffs are entitled to summary judgment. *See Breslow v. Wells Fargo Bank, N.A.*, 857 F.

Supp. 2d 1316, 1322 (S.D. Fla. 2012) (summary judgment for plaintiff on TCPA claim where defendant had no evidence of consent) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

D. The Court should find BLP "willfully or knowingly" violated the TCPA.

The Court may award treble damages up to $1,500 per fax if it finds BLP "willfully or knowingly" violated the statute. 47 U.S.C. § 227(b)(3). Some courts hold "willful or knowing" requires specific intent, meaning the defendant knows it is violating the TCPA, but the majority follow a general-intent rule, where the defendant need only be aware of its conduct. *See Stewart v. Regent Asset Mgmt. Solutions*, 2011 WL 1766018, at *6 (N.D. Ga. May 4, 2011) (collecting cases, adopting general-intent interpretation, and awarding treble damages).

Under a general-intent approach, all BLP's faxes were "willful and knowing." BLP designed the faxes, hired a broadcaster, dictated the area codes, dates, and times of day, monitored the results, and sent more faxes based on ticket sales generated. Plaintiffs request $1,500 for the three faxes sent to Plaintiffs on July 15, 2009, August 19, 2009, and May 24, 2010. Under the specific-intent approach, at the very least, the May 24, 2010 fax was willful and knowing. By that time BLP had been litigating the state-court class action for eight months. Under the specific-intent approach, Plaintiffs request $500 for the two 2009 faxes and $1,500 for the May 2010 fax.

II. There is no vicarious-liability requirement in a TCPA unsolicited-fax claim.

BLP will likely argue the FCC's decision in *In re Dish Network, LLC*, 28 F.C.C.R. 6574, 2013 WL 1934349 (May 9, 2013), overruled its prior rulings that a sender who is misled by a fax broadcaster is ultimately liable for resulting unsolicited faxes, instead requiring the sender be "vicariously liable" under common-law agency principles. This argument fails for two reasons: (1) *Dish Network* did not overrule (or even mention) the FCC's prior unsolicited-fax rulings and (2) even if *Dish Network* changed the FCC's position, the new interpretation would apply only to conduct occurring *after* the 2013 ruling; it cannot apply retroactively to BLP's faxes in 2009 and 2010.

A. *Dish Network* did not change the FCC's unsolicited-fax rules.

In *Dish Network*, the FCC interpreted TCPA telemarketing provisions defining "seller" as the person "on whose behalf" a telephone call is "initiated." *Id.* The calls were "initiated" by a third-party telemarketer, and there was no provision in the applicable rules defining "seller" as the person whose "goods or services" were marketed (as in the unsolicited-fax rules). So the plaintiffs needed a way to establish the calls were initiated "on [the defendants'] behalf," and they sought to use common-law agency principles. The FCC agreed, allowing the plaintiffs to use agency law to hold the defendants liable for phone calls initiated "on [their] behalf" by third parties. *Id.* ¶ 48.

Dish Network does not mention the definition of fax "sender," the FCC's 1995 ruling stating the sender is "ultimately liable" for all violations, or the 2006 Junk Fax Order stating "the sender is liable" for all unsolicited faxes, even if it is misled by a fax broadcaster. *Id.* ¶¶ 1–50. It mentions one TCPA fax case in a footnote, where the court held a plaintiff may—not *must*—use agency principles to establish an unsolicited-fax violation where precluding the plaintiff from doing so would allow the defendant to make "an end-run around the TCPA's prohibitions." *Id.* ¶ 29, n.84. At best, *Dish Network* stands for the proposition that the FCC allows consumers to use common-law principles to enforce the TCPA, not that it allows advertisers to use common law to circumvent the TCPA.

If the FCC had meant to revise its unsolicited-fax rules in *Dish Network*, it would have said so. An agency may revise its interpretations (prospectively, as discussed below), but it must do so explicitly. The court in *Addison Automatics, Inc. v. RTC Group, Inc.*, 2013 WL 3771423, at *4 (N.D. Ill. July 16, 2013), recognized this point, holding that using *Dish Network* to import a vicarious-liability standard into unsolicited-fax cases would ignore "the rule promulgated by the FCC that defines 'senders' as the person or entity whose goods or services are advertised or promoted in the unsolicited advertisement." *Id.* The court held the FCC's 2006 rules are "binding on a district court under the Hobbs Act" and so, "even if the Court disagreed with the FCC's definition of a sender, it

has no authority to disregard it." *Id.* "In the absence of a repeal of 47 C.F.R. § 64.1200(f)(10) or a clear statement in a final FCC Order specifically modifying" it, the court held, "it must be applied to this case in its entirety and in accordance with its plain meaning." *Id.* This Court should adopt *Addison Automatics* and reject BLP's invitation to violate the Hobbs Act by imposing vicarious-liability principles in conflict with the FCC's unambiguous fax-advertising rules.

B. Even if *Dish Network* changed the rules, that change would be prospective, not retrospective.

An agency may revise its positions, but those changes apply to prospective conduct only. *Wright v. Dir., Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1574 (11th Cir. 1990) (refusing to apply revised agency regulation retroactively to flood-loss claims that were "clearly 'fixed' at the time of the loss by the regulations then in effect"). A "clarification" may be applied retroactively, but the court must determine whether a ruling is a "clarification" or a "revision." *McPhillips v. Gold Key Lease, Inc.*, 38 F. Supp. 2d 975, 980 (M.D. Ala. 1999). The test is whether the ruling is "consistent with prior interpretations and views expressed by the agency." *Id.* at 980–81 (agency's 1998 commentary did not apply to contract entered into in 1996 where it was inconsistent with prior commentary).

Here, the FCC ruled in 1995 and 2006 that the sender is *always* "ultimately liable," while the fax broadcaster is sometimes also liable, if the plaintiff can prove a higher standard ("high degree of involvement"). In contrast, if BLP is correct about *Dish Network*, the new rule is that the sender is *sometimes* liable, if the plaintiff can prove a higher standard (vicarious liability). BLP's reading of *Dish Network* is therefore "inconsistent" with the 2006 Junk Fax order, and it could apply only to faxing that took place after the effective date of the order, May 9, 2013. BLP's faxes were sent in 2009 and 2010, and they are subject to the 2006 Junk Fax Order even if *Dish Network* changed the rules.

III. BLP is directly and vicariously liable under the common law of agency and torts.

Even if there were no binding FCC "sender" rulings on point, BLP would be liable for the unsolicited faxes sent to Plaintiffs under the common law of agency and torts. Federal courts look to

the Restatements of Law for guidance in these areas. *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524 (2013). The Restatement (Third) of Agency § 7.03 summarizes the standards:

> (1) A principal is subject to direct liability to a third party harmed by an agent's conduct when
>
> (a) as stated in § 7.04, the agent acts with actual authority or the principal ratifies the agent's conduct and
>
> (i) the agent's conduct is tortious, or
>
> (ii) the agent's conduct, if that of the principal, would subject the principal to tort liability; or
>
> (b) as stated in § 7.05, the principal is negligent in selecting, supervising, or otherwise controlling the agent; or
>
> (c) as stated in § 7.06, the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty.
>
> (2) A principal is subject to vicarious liability to a third party harmed by an agent's conduct when
>
> (a) as stated in § 7.07, the agent is an employee who commits a tort while acting within the scope of employment; or
>
> (b) as stated in § 7.08, the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal.

BLP is liable under each of these standards.

A. BLP is directly liable under agency law and tort law.

1. BLP authorized FaxQom to take actions that, if taken by BLP, would subject BLP to liability.

BLP admits it authorized FaxQom to send fax advertisements. (BLP Resp. First Interrogs. No. 14). The Court has held BLP "authorized FaxQom to send the facsimile advertisements on its behalf" and "received the benefits of those faxes." (Doc. 41 at 5–6). The Court need go no further. BLP hired FaxQom to send fax advertisements, and that is what FaxQom did.

In *Am. Copper*, 2013 WL 3654550, at *3, the fax broadcaster represented that "its practices were legal," but the court still held the defendants liable under agency principles. *Id.* Even if they relied on the broadcaster's misrepresentations, the court held, the defendants "responded to [the

broadcaster's] advertisement, paid for VoIP lines, completed a questionnaire, and edited and approved a fax [they] knew would be sent to approximately 10,000 target fax numbers of businesses that had not solicited" the faxes. *Id.* It was irrelevant that the broadcaster lied and that the defendants were "unaware" of all the circumstances, the court held, since they had "significant" knowledge of the details of the broadcast and "control over whether to execute" the faxes. *Id.*

This case is much stronger than *American Copper.* In both cases, the broadcaster misrepresented the legality of the faxes, and the defendants remained blissfully "unaware of exactly how the numbers were generated." In this case, however, BLP did not merely "edit and approve" the fax content; it designed the faxes start to finish, with FaxQom relegated to making suggestions. And while the defendant in *American Copper* had "significant" knowledge of the details of the broadcast, BLP dictated every detail, even giving "interim instructions" to modify the written specifications regarding area codes, dates, times, and content. *See* Restatement (Third) Agency § 1.01, cmt. f(1). BLP did not merely have control over "*whether* to execute the fax," it controlled the *how* and *when* of the broadcasts, monitoring them in real time, chastising FaxQom if it did not receive its "sample" on time, and tracking the resulting ticket sales to see if it was getting its money's worth.

BLP's argument that it cannot be held liable because FaxQom promised not to break the law would overturn settled agency and tort law. Under Restatement (Second) of Agency § 212 (1958), "[i]f one intends a particular result to follow from his conduct and the result follows, it is immaterial that the particular way in which it is accomplished was unintended." This rule "results from the general rule, stated in the Restatement of Torts, that one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result." *Id.* The Restatement (Second) of Torts § 877 states that "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability" if the person (1) "orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his

own," (2) "conducts an activity with the aid of the other and is negligent in employing him," or (3) "has a duty to provide protection" for third persons "and confides the performance of the duty" to another who "fail[]s to perform the duty." All three conditions apply here.

First, BLP knew or should have known the faxing violated the TCPA. BLP was aware of the TCPA and the 2006 Junk Fax Order, but did not investigate how FaxQom supposedly obtained permission from millions of people. BLP failed investigate further by asking for contact information for some of these "opt-ins" to confirm they had consented. Second, BLP was negligent in employing FaxQom, failing to inquire about where FaxQom was located or how many people it employed to obtain permission from millions of people. BLP took FaxQom at its word, and doing so carries risks. Third, BLP had a statutory duty to obtain permission from Plaintiffs before sending the faxes, and it confided performance of that duty to FaxQom, who failed to perform. The Court need go no further to find BLP directly liable under agency and tort law.

2. BLP ratified FaxQom's conduct.

A principal may ratify its agent's acts, even if originally unauthorized, and such ratification relates back and supplies original authority. *Banyan Corp. v. Schucklat Realty, Inc.*, 611 So.2d 1281, 1282 (Fla. 2d DCA 1993). The test is whether the principal affirmatively accepts the benefits of the conduct while "fully informed" of the circumstances. *Id.* Here, BLP had actual notice its fax campaign violated the TCPA, but continued faxing anyway because it was generating ticket sales. BLP suspected it was unlawful from the start, which is why it insisted on an indemnification agreement from FaxQom and drafted an addendum to give it greater "comfort." BLP was threatened with a lawsuit on the second day of faxing. (BLP000053). That alone should have caused BLP to reexamine the legality of the faxing, but when BLP's owner learned of the threat, his only response was, "email me our signed indemnification"(BLP000052). Instead of consulting a lawyer, BLP told consumers to just "opt out" (*id.*), assuming "[a]ll is well," and sending more faxes

(BLP000058). In the meantime, BLP tracked the benefits of the campaign, concluding it nearly made its money back within a week of faxing and sending thousands more faxes. (BLP00676).

When more complaints rolled in, including a threat of an FCC complaint on July 22, 2009 (BLP00144–47), BLP decided to remove the fax number from the list, but to "go for round 2" without pausing to ask why these supposed "opt-in" consumers were complaining. BLP also knew a "hospital" had complained about the faxes, but it merely instructed FaxQom to remove its number from the list rather than investigate why a hospital was receiving its faxes in the first place. BLP believed some consumers brought the faxes on themselves by "sign[ing] up for every free offer they see" (BLP00677), but it could not have held that belief with regard to a hospital.

Then came attorney Phyllis Towzey's letter on August 20, 2009, explaining in detail that BLP was violating the TCPA. BLP's General Counsel spoke with Towzey, and Towzey wrote a subsequent letter correcting General Counsel's misapprehension that BLP could not be held liable under the TCPA because it had an indemnification agreement with FaxQom and because FaxQom "sent" the faxes. Towzey's communications put BLP on notice (if it was not already) that it was violating the TCPA. *See* Restatement (Second) of Agency § 268 ("[N]otification given to an agent is notice to the principal" if given "to an agent authorized to receive it.").

Cin-Q served BLP with a class-action TCPA complaint in 20009. BLP sent a letter to FaxQom asking it to provide cost of defense and indemnification, which was returned undeliverable, and BLP appeared and filed a motion to dismiss. BLP had actual notice of the risk, but it did not stop faxing. Instead, it sent more faxes through FaxQom, including another fax to Medical & Chiropractic in May 2010. In doing so, BLP ratified not only the May 2010 faxes, but *all* the faxes.

Fundamentally, BLP did not care whether its faxing was legal, as long as it had indemnification from FaxQom (e.g., BLP000052). BLP believed indemnification would relieve it of TCPA liability, but indemnification *presupposes* the risk of liability and insures against it. *Osorio v. State*

Farm Bank, F.S.B., 857 F. Supp. 2d 1312, 1315 (S.D. Fla. 2012) ("A contract for indemnity is an agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party."). It does not relieve the indemnitee of liability. *Id.* BLP may or may not recover its losses from FaxQom, but that does not excuse BLP's underlying liability to Plaintiffs.

3. BLP was negligent in selecting, supervising, and controlling FaxQom.

Under the Restatement (Third) of Agency § 7.05 "[a] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." Here, BLP negligently selected FaxQom. BLP asked nothing about the details of how FaxQom was able to obtain consent from millions of people, where it was located, how many people it employed, or its use of subcontractors. It was content to trust FaxQom's representation that it obtained the numbers "legally," and leave it at that.

BLP also negligently supervised and controlled FaxQom. BLP brushed consumer complaints aside, directing its personnel to take the consumers' numbers off the list, but failing to consider why these "opt-in" consumers were complaining in the first place. Glazer, the owner, told Kaiser not to worry about calling a complainant back to explain what happened, and was interested only in the indemnification agreement. (BLP000052). Kaiser put the blame squarely on the consumers, stating, "[i]f these people didn't sign up for every free offer they see, then their names probably wouldn't end up in 2 separately complied [sic] marketing databases of 'opted-in' recipients. I wish there was a nice way to explain that to them." (BLP00677). BLP never considered whether it was to blame, always taking FaxQom's word, and its willful blindness was negligent.

4. BLP delegated its statutory duty to FaxQom, which failed to perform.

Under the Restatement (Second) of Agency § 214, a person under a statutory duty to another who "confides the performance of such duty" to another is "subject to liability to such

others for harm caused to them by the failure of such agent to perform the duty." These "non-delegable" duties are often imposed "by statute." *Id.* cmt. e; *Royal Ins. Co. of Am. v. Whitaker Contracting Corp.*, 295 F.3d 1381, 1382–83 (11th Cir. 2002) (general contractor had non-delegable duty to maintain roadway under Alabama statute, and indemnification agreement with subcontractor was irrelevant, since party "may be indemnified for its nondelegable duty," but "it nevertheless retains this duty"); *Brown v. CSX Transp., Inc.*, 363 F. Supp. 2d 1342, 1344 (M.D. Fla. 2005) (employer had non-delegable duty under federal statute was liable even if party delegated authority was negligent); *see also Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 909 (11th Cir. 2004) (cruise line had non-delegable duty under carrier-passenger relationship and was liable for crew-member assaults).

The FCC recently ruled that a text-message sender could not delegate away its TCPA duty to obtain prior consent in *In re GroupMe, Inc./Skype Communications*, CG Docket No. 02-278, FCC-14-33, 2014 WL 1266074, Declaratory Ruling (Mar. 27, 2014) (Ex. L). In *GroupMe*, the FCC held a text-based social network may send a text to a person who gives express consent, even if the consent is "conveyed to the text-based social network by an intermediary." *Id.* ¶ 1. But the FCC also stated, "[t]o ensure that the TCPA's consumer protection goals are not circumvented, we emphasize that social networks that rely on third-party representations regarding consent remain liable for TCPA violations when a consumer's consent was not obtained." *Id.* The FCC stressed its ruling was not a "get-out-of-jail-free card" because "a caller remains liable for TCPA violations when it relies upon the assertion of an intermediary that the consumer has given such prior express consent." *Id.* ¶ 14.

GroupMe is right on point. Viewed in the light most favorable to BLP, it relied on an intermediary's representation that it had obtained permission from Plaintiffs when it had not. Now BLP is liable, just like the text-based social network would be liable in *GroupMe* under the same circumstances. *GroupMe* is not an unsolicited-fax ruling, but neither is *Dish Network*. If BLP can use

non-fax FCC orders to import a new vicarious-liability standard, then it must take all comers. Under *GroupMe*, if an intermediary lies to a principal about obtaining consent, the principal is liable.

B. BLP is vicariously liable for FaxQom's acts within the scope of its employment and with apparent authority.

1. FaxQom acted within the scope of its employment to send Buccaneers fax advertisements.

Under Restatement (Third) of Agency § 7.07, "[a]n employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment." An "employee" is defined as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work." *Id.* An employee acts within the "scope of employment" when "performing work assigned by the employer or engaging in a course of conduct subject to the employer's control" but not when the act "occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Id.*

Here, FaxQom is BLP's "employee" under § 7.07. BLP had "the right to control" FaxQom entirely, even if it did not exercise that right responsibly. The contract BLP negotiated gave it total control over "the times and dates" faxes were sent and provided BLP could order FaxQom to "stop the campaign and refund all monies" immediately.[2] (BLP000069). BLP also designed all the content top to bottom (except the "remove" language).

FaxQom was hired to send the content dictated by BLP to the area codes dictated by BLP at the dates and time dictated by BLP. That is what it did. At any time, BLP could have demanded to see the fax list or contact information for consumers to verify they had given permission to receive BLP's faxes. It could have asked why the consumers who complained were on the list in the first

[2] The Eleventh Circuit has interpreted "scope of authority" in the criminal context to mean "acts or omissions that [the defendant] has the power to prevent." *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999). BLP had the "power to prevent" the violations at issue here at any time.

place. It never did. FaxQom did not send faxes in "an independent course" of its own purpose. It sent them to "serve the purpose" of BLP's fax campaign, which is what it was paid to do.

The fact that BLP's fax campaign violated the TCPA does not mean FaxQom was not authorized. "The fact that the employee performs the work carelessly does not take the employee's conduct outside the scope of employment, nor does the fact that the employee otherwise makes a mistake in performing the work." Restatement (Third) Of Agency § 7.07 cmt. c. "Likewise, conduct is not outside the scope of employment merely because an employee disregards the employer's instructions." *Id.*; *id.* § 7.03 (citing *SuccessFactors, Inc. v. Softscape, Inc.*, 544 F. Supp. 2d 975, 981 (N.D. Cal. 2008) (employee's conduct not outside scope of employment merely because unauthorized)).

2. FaxQom acted with apparent authority.

Under Restatement (Third) Of Agency § 7.08, a principal is subject to "vicarious liability" for a tort committed by an agent acts with "apparent authority." For example, in *Phillips Petroleum Co. v. Royster*, 256 So.2d 559, 561 (Fla. App. Ct. 1972), a gasoline company sued a service station owner to recover damages resulting from false credit-card sales made at the owner's station. The owner argued the false sales were made by an agent operating the station under a written power of attorney authorizing the agent to perform only "lawful acts." *Id.* at 559. Since the sales were not "lawful," the owner argued, the agent was acting outside the scope of his authority. *Id.* at 560.

The Florida court rejected that argument, holding the fraud was "committed in connection with the apparent scope of said agent's authority." *Id.* The power of attorney authorized only "lawful acts," but that did not "absolve [the owner] from claims of third parties" arising from acts within the agent's "apparent scope of his authority." *Id.* Although the owner did not "expressly empower" the agent to commit fraud, and it was "unfortunate" the owner had to pay for an agent's torts, the court held the plaintiff was "equally without fault" and that "where one of two innocent parties must suffer a loss, that loss must be borne by the one whose acts enabled the loss to occur." *Id.* at 561.

C. It is irrelevant whether FaxQom physically pressed the "send" button.

BLP may argue that, although it authorized FaxQom to send the faxes, it cannot be held liable because FaxQom used third parties to physically transmit the faxes over phone lines. First, this argument fails because an agent "has implied authority to delegate the performance of ministerial acts, not requiring the exercise of judgment and discretion, to a subagent," and "express authority" is not required. *Empire Gas & Fuel Co. v. Allen*, 294 F. 617, 619 (5th Cir. 1923); Restatement (Third) Agency § 3.15, cmt. c (authority implied given "nature of the work"). Here, the use of phone lines (and whatever third parties necessary to reach those lines) is implied in the written agreement, which stated BLP was merely "broadcasting through FaxQom." (BLP000068). Nowhere does the agreement state FaxQom must physically control every aspect of the technology or prohibit FaxQom from delegating necessary ministerial tasks to accomplish the results BLP directed. (*Id.*)

Second, this argument fails under tort law, independent of *any* agency relationship, since BLP "order[ed] or induce[ed]" the faxing, it negligently hired FaxQom, and FaxQom failed to perform BLP's non-delegable duty of obtaining prior permission. *See* Restatement (Second) of Torts § 877. As in *Phillips*, 256 So.2d at 561, the resulting damages are "borne by the one whose acts enabled the loss to occur."

Conclusion

For the foregoing reasons, the Court should enter summary judgment on liability for Plaintiffs on direct "sender" liability under the TCPA and, in the alternative, direct and vicarious liability under the common law of agency and torts.

Respectfully submitted,

CIN-Q AUTOMOBILES, INC. and MEDICAL & CHIROPRACTIC CLINIC, INC., individually and as

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2014, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the persons listed below.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

CIN-Q AUTOMOBILES, INC. and MEDICAL & CHIROPRACTIC CLINIC, INC., Florida corporations, individually and as the representatives of a class of similarly-situated persons, Plaintiff, v. BUCCANEERS LIMITED PARTNERSHIP and JOHN DOES 1-10, Defendants.	Civil Action No.: 8:13-CV-01592-17 EAK-AEP

APPENDIX OF EXHIBITS
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Exhibit A	Deposition Transcript – Matthew Kaiser (03/25/14)
Exhibit B	Defendant's Responses to First Requests for Admission
Exhibit C	Group Exhibit of Business Records Produced by Defendant
Exhibit D	Second Amended Complaint 01/03/2014
Exhibit E	Deposition Transcript – Craig Cinque
Exhibit F	Affidavit of Phyllis J. Towzey
Exhibit G	Deposition Transcript – Manual Alvare (05/02/14)
Exhibit H	State Court Complaint (08/28/09)
Exhibit I	Defendant's Motion to Dismiss State Court Complaint (10/02/09)
Exhibit J	Declaration of Robert Biggerstaff
Exhibit K	Deposition Transcript of Michele Zakrzewski (02/12/14)
Exhibit L	*In re GroupMe, Inc./Skype Communications*, Docket No. 02-278, FCC-14-33, 2014 WL 1266074 (Mar. 27, 2014)

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I HEREBY CERTIFY that on May 27, 2014, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/Ryan M. Kelly
Ryan M. Kelly